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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

SHELLY L., Appellant, v. ARIZONA DEPARTMENT OF ECONOMIC SECURITY, NETERU A., and YAZMEEN A., Appellees.	2 CA-JV 2008-0090 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. 18199600

Honorable Charles S. Sabalos, Judge

AFFIRMED

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H O W A R D, Presiding Judge.

¶1 Appellant Shelly L. appeals from the juvenile court's order terminating her parental rights to Neteru A., born in August 2005, and Yazmeen A., born in October 2006,

on the ground of fifteen-month out-of-home placement pursuant to court order. *See* A.R.S. § 8-533(B)(8)(b), renumbered as § 8-533(B)(8)(c); 2008 Ariz. Sess. Laws, ch. 198, § 2.[1] Shelly contends the court abused its discretion and violated her due process rights when it permitted the Arizona Department of Economic Security (ADES) to amend its motion to terminate her parental rights to include the additional ground of fifteen-month out-of-home placement. She also contends there was insufficient evidence to support the order terminating her parental rights pursuant to § 8-533(B)(8)(b). We affirm for the reasons stated below.

¶2 The record establishes that the children were removed from the home on April 6, 2007, after an incident involving extreme domestic violence between the parents. Police officers went to Shelly's home in response to a 911 telephone call from Anthony, the children's father and Shelly's husband. Shelly had been beaten badly; her face was bleeding, her eyes were swollen, and two of her teeth had been knocked out. On the floor of the living room, the officers found pools of blood, Shelly's teeth, and a revolver from which five or six rounds had been fired. There were bullet holes in the ceiling and window. The officers found twenty-month-old Neteru asleep in a crib and Yazmeen, then six months old, crying in a swing in another room. Anthony drove himself to a hospital, where he was treated for gunshot wounds, and Shelly was taken to another hospital. The children were placed with their paternal grandparents.

[1]In this decision, we will refer to the statute as numbered at the time the juvenile court entered the termination order.

¶3 ADES filed a dependency petition on April 11, 2007. It alleged Shelly had "failed to protect the children from [the] effects of the[ir] father's mental illness, which she admitted she was aware of." ADES further alleged that, "[i]n spite of signs of serious mental illness, the mother continued to leave the children in the father's care on a daily basis." Additionally, ADES alleged Shelly had "reported that the father was diagnosed with schizophrenia while he was serving time in prison for a stabbing." The juvenile court adjudicated the children dependent in August 2007 after Shelly denied the allegations in the petition and agreed the matter could be submitted to the court based on the record before it. The court approved the case plan goal of reunification and found that ADES had "made reasonable efforts to eliminate the need for continued out-of-home placement and to reunify the family."

¶4 After a dependency review hearing in January 2008, the juvenile court found Shelly was only partially compliant with the approved case plan and changed the case plan goal to a concurrent plan of reunification and severance. After a permanency hearing on April 1, 2008, the court found neither parent was in compliance with the case plan. And once again the court found ADES had made reasonable efforts to reunify the family and had offered "services such as psychological evaluations, individual counseling, anger management and domestic violence counseling, parenting classes, Child and Family Team meetings, 'AZEIP' referrals, transportation, supervised visitation and professional case management." The court found both parents had "failed to remedy the circumstances that cause[d] the children to remain in out-of-home placement" and that the children could not

safely be returned to either parent. The court changed the case plan goal to severance and adoption and directed ADES to file a motion to terminate Shelly's parental rights; ADES filed its motion on April 8, 2008, alleging § 8-533(B)(8)(a) as the statutory ground for termination.

¶5 The two-day severance hearing began on August 5, 2008. At the beginning of the first day of the hearing, the court asked ADES whether it intended to proceed on only the ground it had alleged in the motion. When counsel for ADES stated he might move to amend after the close of evidence to add neglect or abuse as a ground, *see* § 8-533(B)(2), the court pointed out the potential due process implications of adding that ground at the end of the hearing and "sustained" Shelly's objection to any such amendment.

¶6 Shortly thereafter, ADES began its direct examination of caseworker Katelund Kimball-Linares. The juvenile court interjected that it appeared at that point the children had been out of the home for fifteen months or longer and again raised the issue of amending the motion for termination. ADES then moved to amend its motion to add § 8-533(B)(8)(b) as a ground. Over Shelly's objection, the court granted the request and subsequently terminated Shelly's parental rights pursuant to § 8-533(B)(8)(b). Although the court's minute entry of August 7, 2008, contained thorough findings of fact and conclusions of law, ADES subsequently submitted formal findings and conclusions as the court had directed; the court signed and entered that order, and this appeal followed.

¶7 Shelly first challenges the juvenile court's order permitting ADES to amend its motion for termination to add fifteen-month out-of-home placement as a ground. She

essentially concedes Rule 15, Ariz. R. Civ. P., which pertains to the amendment of pleadings in civil cases, applies to severance proceedings. Asserting that "[t]he Rules of procedure are written with the goal of meeting due process requirements," she maintains "due process was not accomplished" because the court "failed to strictly adhere to the requirements of the Rules of Civil Procedure." We will not disturb a juvenile court's ruling on such a motion absent an abuse of discretion. *See In re Maricopa County Juv. Action No. JS-501904*, 180 Ariz. 348, 355, 884 P.2d 234, 241 (App. 1994).

¶8 Rule 15(a)(1) provides in relevant part that "a party may amend the party's pleading only by leave of court . . . . Leave to amend shall be freely given when justice requires." In *Maricopa County No. JS-501904*, Division One of this court acknowledged Rule 15 provides that leave to amend be liberally granted but also recognized due process principles require that a parent be given "adequate notice of the new theory and an opportunity to defend against the allegations." 180 Ariz. at 355, 884 P.2d at 241. As the court stated, "'[n]otice and substantial prejudice to the opposing party are critical factors in determining whether an amendment should be granted.'" *Id.*, *quoting Owen v. Superior Court*, 133 Ariz. 75, 79, 649 P.2d 278, 282 (1982) (alteration in *Maricopa County No. JS-501904*).

¶9 As the juvenile court observed when it permitted the amendment, ADES could not have included § 8-533(B)(8)(b) as a ground when it initially filed the motion in April because, at that point, the children had been out of the home for just over twelve months. Moreover, as the court also seemed to suggest, Shelly already had notice she would have to

defend against the allegation that the children had remained out of the home for nine months or longer. The court viewed the amendment as merely adding a variant of the same subsection of the statute, § 8-533(B)(8), already alleged. Thus, the amendment added a ground that was supported by facts already in issue, *see Owen*, 133 Ariz. at 79-80, 649 P.2d at 282-83, and alleged a legal theory that, although distinct, is substantially similar to the one already asserted. Additionally, the motion was amended at the beginning of the hearing.[2] The court's comments reflect its clear understanding and consideration of the potential due process implications of permitting the amendment and the significance of the timing of that amendment. Neither below nor on appeal has Shelly established how she was prejudiced by the amendment of the motion at the very beginning of the severance hearing. Therefore, based on the record before us, we cannot find the court abused its discretion or violated Shelly's due process rights.

¶10 Next, Shelly contends ADES did not present sufficient evidence that she had failed to remedy the circumstance that caused the children to remain out of the home or that there is a substantial likelihood she will not be able to parent the children in the near future, both elements of § 8-533(B)(8)(b). On appeal, we view the evidence in the light most favorable to sustaining the court's order. *See Lashonda M. v. Ariz. Dep't of Econ. Sec.*, 210

[2]In fact, the court made it clear to ADES that Shelly potentially would be prejudiced if ADES were to wait until the end of the hearing or after the presentation of additional evidence because she possibly would have lost the opportunity to either introduce evidence or cross-examine ADES's witnesses in relation to the additional ground. The court stated it would find it more difficult to justify granting the request to amend at that juncture. By suggesting that ADES seek to amend its motion when it did, the court was able to avoid the potential prejudice to Shelly in permitting the amendment when it did.

Ariz. 77, ¶ 13, 107 P.3d 923, 928 (App. 2005). As long as there is reasonable evidence to support the factual findings upon which a severance order is based, we will affirm. *See Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, ¶ 4, 53 P.3d 203, 205 (App. 2002).

¶11 A juvenile court may terminate a parent's rights only if it finds by clear and convincing evidence that a statutory ground for severance exists and if it finds by a preponderance of the evidence that severance is in the child's best interests. A.R.S. §§ 8-533(B), 8-537(B); *Kent K. v. Bobby M.*, 210 Ariz. 279, ¶ 41, 110 P.3d 1013, 1022 (2005). There is reasonable evidence in the record to support the thorough factual findings set forth in the court's August minute entry and incorporated to a large degree in the September formal order. Although no purpose would be served by rehashing those findings here, *see Jesus M.*, 203 Ariz. 278, ¶ 16, 53 P.3d at 207, we note the salient portions of the court's order as they relate to Shelly's challenge on appeal.

¶12 The juvenile court noted there had been incidents of domestic violence in this family. Anthony had been arrested, convicted of aggravated assault, and sentenced to an aggravated prison term of five years. The court noted further that the incident that had resulted in the children's removal from the home was not the first incident of domestic violence involving Anthony and Shelly. The court found that Shelly knew about the incident that had resulted in Anthony's imprisonment and had been the victim of his violence and mental illness before but had failed, nevertheless, to recognize and understand the threat he posed to her and to the children. The court stated it found Shelly's lack of understanding of the threat Anthony presented "troubling." The court added that Shelly

was only partially in compliance with the case plan and had failed to benefit from individual counseling because she did not understand the dynamics of domestic violence and the danger Anthony would continue to pose because of his violent tendencies and serious, untreated mental illness.

¶13 The juvenile court was well aware of and specifically noted those portions of Dr. German's testimony that were favorable to Shelly. But the court also had before it the evidence demonstrating the intensity of the violence that had prompted Child Protective Services (CPS) to remove the children in April 2007. Additionally, the CPS investigator suggested that, in her view, the situation at home had never become sufficiently safe to return the children. There was evidence to support the court's assessment that Shelly had "gone through the motions" in terms of following the case plan but had not seriously engaged in the services and, consequently, had not benefitted from those services. For example, the case manager testified Shelly demonstrated a "flat affect" when she visited the children. She was concerned Shelly was not able to appreciate the danger Anthony posed to the children or "to assess the danger that people in general pose[d] to the children." She did not view Shelly as having benefitted from the services she had utilized. Another case manager articulated similar concerns. Based on Shelly's comments to this case manager that she did not need services and saw no purpose in engaging in therapy and on the case manager's other observations, there was reasonable evidence to support the court's finding that Shelly had simply "gone through the motions."

¶14 It was for the juvenile court to weigh that evidence in determining whether ADES had sustained its burden of establishing that a ground for terminating Shelly's parental rights existed. *See Jesus M.*, 203 Ariz. 278, ¶ 4, 53 P.3d at 205 ("The juvenile court, as the trier of fact in a termination proceeding, is in the best position to weigh the evidence, observe the parties, judge the credibility of witnesses, and make appropriate findings."). We will not interfere with the juvenile court's assessment and weighing of the evidence. *See id*. And, although there were conflicts in the evidence, it was for the juvenile court to resolve them. *Vanessa H. v. Ariz. Dep't of Econ. Sec.*, 215 Ariz. 252, ¶ 22, 159 P.3d 562, 567 (App. 2007). The court had found, a number of times during the dependency proceeding, that ADES had provided reasonable reunification services and that Shelly nevertheless had been unable to remedy the circumstances that caused the children to remain out of the home. Shelly never challenged those findings. The court made the same findings again when it terminated her rights. As discussed above, ample evidence supported those findings and the additional finding that there is a substantial likelihood that Shelly would not be capable of exercising proper and effective parental care and control in the near future.

¶15 The juvenile court's order terminating Shelly's parental rights to Neteru and Yazmeen is affirmed.

JOSEPH W. HOWARD, Presiding Judge

CONCURRING:

JOHN PELANDER, Chief Judge

PHILIP G. ESPINOSA, Judge